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Opinion on transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS VASQUEZ,

Defendant and Appellant.

B26162

(Los Angeles County
Super. Ct. No. KA 112667)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Mike Camacho, Judge. Affirmed and
remanded with directions.

Jack T. Weedin, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, and Shawn McGahey Webb, Deputy Attorney
General, for Plaintiff and Respondent.

Defendant and appellant Carlos Vasquez challenged the trial court's imposition of a sentence of 45 years to life for his third-strike conviction for armed robbery. (Pen. Code, § 211.)¹ He argued the trial court abused its discretion by denying his motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) to strike one of his prior felony conviction allegations for purposes of sentencing. He also contended that, following the passage of Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill No. 620), we must remand the case to the trial court to exercise its discretion regarding whether to impose a handgun enhancement. We agreed with Vasquez's argument on Senate Bill No. 620, and remanded the case for the trial court's reconsideration of the firearm enhancement. We otherwise affirmed.

After our opinion was filed, the Governor signed Senate Bill No. 1393 (Stats. 2018, ch. 1013), which renders discretionary the previously mandatory five-year sentence enhancement under Penal Code section 667, subdivision (a)(1).

On November 14, 2018, our Supreme Court ordered our decision in this matter vacated and directed us to reconsider the cause in light of Senate Bill No. 1393. Because this case was not yet final on January 1, 2019 when Senate Bill No. 1393 went into effect, we agree that its potentially ameliorative amendments should apply to Vasquez's sentencing.

¹ Unless otherwise specified, subsequent statutory references are to the Penal Code.

Accordingly, we affirm, but remand so that the trial court may consider whether to exercise its newly enacted discretion to strike one or more of Vasquez's prior convictions for the purposes of avoiding one or more section 667, subdivision (a)(1), five-year sentencing enhancements.

FACTS AND PROCEEDINGS BELOW

At approximately 8:00 p.m. on the evening of May 26, 2016, Vasquez entered a Little Caesars pizza restaurant in Claremont. He pulled out a gun and said, "Everybody give your money," and "[p]ut the money on the counter, whatever you got." One customer put some change on the counter, but Vasquez did not attempt to retrieve it. Vasquez pointed the gun at the cashier and said, "Give me the money." The store manager saw something was amiss and asked what was going on. The cashier replied, "I'm getting robbed." The cashier handed over approximately \$100 to \$200 from the cash register; Vasquez put the money in a plastic bag and ran out the door.

Two Claremont police detectives were traveling in an unmarked pickup truck within a mile of the restaurant when they heard a radio call regarding the robbery. They went toward the area where the suspect was reported to be fleeing, where they began following the only car they saw moving. After following the car for some distance, the detectives turned on their red-and-blue lights, and the car stopped. Vasquez exited from the passenger door, and when one of the detectives identified himself as a police officer, Vasquez began running away. Vasquez stopped when he reached a locked gate and did not resist the detectives as they took him into custody. A sergeant with the Claremont Police Department who had arrived on the scene searched Vasquez's car and found clothing similar to that worn during the robbery,

along with a plastic bag full of money. He also discovered a loaded handgun under the rear of a big rig trailer parked directly in front of Vasquez's car, near where Vasquez had run while fleeing from the police.

A customer in the store at the time of the robbery later identified Vasquez as the robber. In a subsequent police interview, Vasquez admitted that he had entered the Little Caesars that night. Vasquez told the officer that he did not want to hurt anyone but needed money because he was addicted to drugs.

An information, as amended October 17, 2016, charged Vasquez with three counts of armed robbery, in violation of section 211. All three counts arose out of the incident at the Little Caesars, with one count each for robbery of the cashier, the store manager, and the customer who was seen putting money down on the counter. A fourth count charged Vasquez with resisting, delaying, or obstructing a peace officer, in violation of section 148, subdivision (a)(1). The information further alleged that Vasquez personally used a firearm in the commission of the robberies, within the meaning of section 12022.53, subdivision (b), and that Vasquez had suffered three prior strike convictions, two prior serious felonies (§ 667, subd. (a)(1)), and two prison priors. (§ 667.5, subd. (b)).

A jury found Vasquez guilty of one count of robbery, and found true the allegation that he personally used a firearm in its commission. The jury also convicted Vasquez of resisting, delaying, or obstructing an officer. The jury acquitted Vasquez of robbery of the restaurant manager, and the trial court dismissed for insufficient evidence the count of robbery of the customer who put change down on the store counter. Following his conviction, Vasquez admitted three prior strike convictions. Vasquez filed a *Romero* motion asking that the trial court exercise its discretion to

strike the prior serious and violent felony allegations for purposes of sentencing. The court denied the motion.

The trial court sentenced Vasquez to 45 years to life in prison, as follows: 25 years to life for robbery, as a third-strike sentence (see §§ 667, subd. (e)(2), 1170.12, subd. (c)(2)); plus an additional 10 years for the firearm enhancement under section 12022.53, subdivision (b); plus an additional five years for each of the two prior serious felony convictions pursuant to section 667, subdivision (a)(1). The court declined to impose a sentence on the prison priors in the interests of justice. The court also imposed a one-year sentence for resisting, delaying, or obstructing a peace officer to be served concurrently.

DISCUSSION

I. *Romero* Motion

Under section 1385, subdivision (a), a trial court may on its own motion order an action dismissed “in furtherance of justice.” In *Romero*, our Supreme Court held that this authority allows “a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law.” (*Romero, supra*, 13 Cal.4th at pp. 529–530.) A court’s decision whether or not to exercise this authority is reviewed for abuse of discretion. (*Id.* at p. 530.)

In *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*), the Court clarified the standards courts must apply in deciding whether striking a prior felony conviction allegation would be in furtherance of justice. In such cases, “the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole

or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Id.* at p. 161.)

In this case, Vasquez filed a *Romero* motion asking the trial court to strike his three prior strikes. The first two prior strikes were convictions for residential burglary in 1993. (§ 459.) Vasquez testified that one night while he was drunk, he and some friends broke into two garages searching for beer. He admitted that he intended to steal beer, but claimed he did not actually steal anything. Vasquez received a sentence of 3 years 4 months in prison and was paroled in 1996.

Shortly after being paroled, Vasquez was arrested for robbery (§ 211), which led to his next strike conviction. Vasquez testified that he and some friends stole beer from a store. The clerk at the store tried to stop them, and they pushed past the clerk. The court sentenced him to 11 years in prison for this offense. While he was in prison in 1998, Vasquez was convicted of possession of a weapon by a prisoner (§ 4502, subd. (a)) and sentenced to an additional six years in prison. He was paroled in June 2013, approximately three years before he committed the robbery in this case.

The trial court denied the *Romero* motion, noting that “Vasquez has pretty much been in and out of custody his entire adult life for various crimes. . . . There is very little to no indicia that he has rehabilitated his ways.” The court pointed out that Vasquez used a firearm in robbing the Little Caesars, indicating “that there is a progression here of dangerousness to society and public safety.” The court stated that it considered “the seriousness of the present offense, the seriousness of the prior cases and the defendant’s prospects, his background, and likelihood of recidivism which would either keep him within the spirit of three strikes or outside the spirit of three strikes.” In light of all these factors,

the court concluded that “it would be irresponsible of any court to grant this type of motion and strike these strikes with this type of criminal history.”

Vasquez acknowledges that the trial court cited the relevant factors described in *Williams, supra*, 17 Cal.4th 148. Nevertheless, Vasquez contends that the trial court abused its discretion by refusing to strike his prior strikes because the court failed to take into account his age at sentencing and his age at his earliest possible parole date, because it did not consider that he had a “juvenile brain” at the time he committed his prior offenses, and because it failed to consider the evolution of sentencing laws since *Romero* and *Williams*.

We are not persuaded. Vasquez notes that he was 41 years old at the time of sentencing, and that under the sentence the trial court imposed, he will not be eligible for parole until he is 78 years old, assuming all possible credit for good behavior. This is without a doubt a very long sentence, but the Three Strikes law was designed to impose long sentences on recidivist offenders. Vasquez argues that current research on the human brain shows that the brain does not mature until an individual is approximately 25 years old. But although Vasquez was young when he committed his prior strikes, in this case, he committed armed robbery after the age of 40 years old. His current offense was more serious and more dangerous than the crimes he committed with a “juvenile brain.” Finally, Vasquez cites no evidence that “legislative and societal standards have evolved” since the Supreme Court’s decisions in *Romero* and *Williams*. It is true that fewer defendants are eligible for third-strike sentencing following the passage of

Proposition 36 in 2012,² but the law still imposes life sentences on defendants who, like Vasquez, commit a serious or violent offense as their third strike.

Vasquez has failed to show that the trial court abused its discretion by denying his *Romero* motion.

II. Resentencing under Senate Bill No. 620

In October 2017, the Governor signed into law Senate Bill No. 620. The bill amended section 12022.5 and section 12022.53, which define enhancements for defendants who personally use a firearm in the commission of certain felonies. Under Senate Bill No. 620, “[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section.” (Sen. Bill No. 620, §§ 1 & 2, amending §§ 12022.5, subd. (c), 12022.53, subd. (h).) Prior to the enactment of Senate Bill No. 620, these enhancements were mandatory, and the trial court lacked the authority to strike or dismiss them. (See, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363, citing former § 12022.53, subd. (h).)

² Proposition 36 refers to the Three Strikes Reform Act of 2012, as approved by voters (Ballot Pamp. Gen. Elec. (Nov. 6, 2012), effective Nov. 7, 2012), which amended the Three Strikes law so that defendants guilty of nonviolent and nonserious felonies are not subject to life sentences as a result of their prior strikes.

The trial court sentenced Vasquez on November 1, 2017, after the Governor had signed Senate Bill No. 620 but before the law became effective. (See *People v. Hurlie* (2018) 25 Cal.App.5th 50, 54 [Governor signed law on October 11, 2017 to become effective January 1, 2018].) The court imposed a 10-year enhancement on Vasquez pursuant to section 12022.53, subdivision (b), for personal use of a firearm in the commission of the robbery. The change in the law applies retroactively to those like Vasquez whose sentences were not final at the time Senate Bill No. 620 became effective. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679.) Vasquez contends that we must therefore remand the case to the trial court to allow it an opportunity to exercise its discretion regarding the enhancement. The Attorney General disagrees and argues that a remand is not required in this case because the trial court stated on the record that it would not exercise its discretion in favor of Vasquez. We agree with Vasquez that remand is required because the trial court made its statement without the benefit of full information regarding the change in the law or argument from Vasquez's trial attorney.

In *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 (*Billingsley*)), the court remanded a case for resentencing pursuant to Senate Bill No. 620 even though the trial court "suggested it would not have stricken the firearm enhancement under section 12022.53, subdivision (c), even if it had that discretion." (*Billingsley, supra*, at p. 1081.) Because the trial court "was not aware of the full scope of the discretion it now has under the amended statute," its statement did not represent an exercise of its informed discretion. (*Ibid.*)

This same reasoning applies to this case. Here, the trial court's statement cannot be regarded as a final exercise of its informed discretion. At the time of the sentencing hearing, the Governor had signed Senate Bill No. 620 into law only three weeks earlier, and it is clear from the transcript that neither the trial court nor the attorneys had studied the new law in detail. Indeed, Vasquez's attorney did not put forward an argument that the trial court should exercise its discretion to strike the handgun enhancement. Instead, after calling the court's attention to the new law, Vasquez's attorney stated, "I don't think it's going to affect the court's sentence. But I want the court at least perhaps to note it and give the decision that it would make" if the law making handgun enhancements discretionary were already in effect.

Under these circumstances, we cannot regard the trial court's statement as a final decision, and we must remand the case to the trial court for reconsideration of the firearm enhancements.

III. *Senate Bill No. 1393 Argument*

Vasquez's sentence included two five-year enhancements pursuant to the "Three Strikes" law, section 667, subdivision (a)(1), based on two prior serious felony convictions. The version of section 667, subdivision (a)(1) in effect at the time of Vasquez's sentencing did not permit the trial court to strike either of these prior convictions for the purposes of avoiding such five-year enhancements. Senate Bill No. 1393 changed this, however, effective January 1, 2019. Since that date, courts may exercise their discretion under section 1385 to strike, effectively, section 667, subdivision (a)(1) five-year enhancements in the interests of justice.

In a supplemental brief on this issue, the Attorney General agrees that, like Senate Bill No. 620, Senate Bill No. 1393 applies to all cases that are not yet final when the legislation takes effect. Because we see nothing in the language or history of Senate Bill No. 1393 suggesting the Legislature intended otherwise, we agree that this change in law should be retroactively applied to all cases pending on January 1, 2019, including Vasquez's. (See *In re Estrada* (1965) 63 Cal.2d 740, 742 [mandating retroactive application of sentence-ameliorating statute to all judgments not yet final on the date of enactment, absent evidence of contrary legislative intent]; *People v. Francis* (1969) 71 Cal.2d 66, 76 [applying *Estrada* to amended statute that increased court's discretion to impose lesser sentence].)

DISPOSITION

The matter is remanded to the trial court for reconsideration of the firearm enhancements in view of Senate Bill No. 620. The court shall also determine whether to strike any enhancements imposed under section 667, subdivision (a)(1), in view of Senate Bill No. 1393. If the court strikes any such enhancements, it shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.